In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-619

RICHARD NEWTON BLAYLOCK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After trial, the district judge found petitioner guilty[1] of willful refusal to submit to induction, in violation of 50 U.S.C. App. § 462(a), and sentenced him to imprisonment for four and one-half years. The court of appeals affirmed (Pet. App. 32a-36a).

1. On April 14, 1966, petitioner registered with Local Board No. 54, Henrico County, Richmond, Virginia. He was deferred as a student for three years, and was thereafter classified 1-A. A May 26, 1969,

[1] Petitioner waived his right to a jury.

physical examination showed him fit for military service.

Thereafter petitioner applied to the Local Board for a 3-A (dependency) deferment on the basis that his father's health was poor and that he might have to furnish sole support for his parents and sister (Pet. App. 33a). The board reopened petitioner's classification and again classified him 1-A. Petitioner's mother requested an appeal; the Appeal Board voted to continue him in class 1-A.

An order to report for induction on September 24, 1969, was mailed to petitioner on August 15, 1969. On September 11, 1969, petitioner notified the Local Board of his father's death and claimed entitlement to a 3-A deferment. The Board postponed his induction and conducted an interview with petitioner on September 25, 1969, at which time it decided not to recommend the reopening of his classification. (Pet. App. 14a, 33a.)

On September 29, 1969, the Board ordered petitioner to report for induction on October 28, 1969. Following a postponement at the request of the State Director for another physical examination,[2] petitioner was invited for another interview with the Local Board on January 15, 1970. After the interview, at which petitioner said that there had been "no change in his status other than his health" (Pet. App. 5a), the Board recommended to the State Director "a re-

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[2] On October 24, 1969, petitioner was examined by an orthopedic specialist who pronounced him fit for military service.

opening to give a [six] month deferment." (Pet. App. 34a.) The State Director did not reopen the classification, but returned petitioner's file to the Local Board with a notation that although the Local Board had authority to reopen, a dependency questionnaire should be completed and a welfare report obtained before it decided whether to do so (Pet. App. 6a, 34a).

The dependency questionnaire sent to petitioner by the Local Board and returned on January 27, 1970 (Pet. App. 1a-4a), indicated that the family home was owned free of mortgage, that petitioner's sister earned $2,000 per year, and that his mother was unable to work and that it was his responsibility "to take over where [his] father left off, since there is no one else to do so." The county welfare report furnished at the board's request set forth the family's financial situation: the home was paid for; the family had neither outstanding debts, nor regular medical expenses; petitioner's mother "has $2,000 saved"; petitioner's sister is employed full-time; petitioner could apply for an allotment for his mother while he served in the military; and petitioner's mother "should receive VA widow's benefits" (Pet. App. 7a-8a). The report concluded that it was not necessary for petitioner to remain at home (Pet. App. 8a, 34a).

On March 13, 1970, the Local Board ordered petitioner to report for induction on March 24, 1970, and advised him that it had not reopened his classification (Pet. App. 9a). Petitioner reported on the date specified but refused to submit to induction.

2. After a registrant has been ordered to report for induction, the local board shall not reopen his classification unless it "first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." 32 C.F.R. 1625.2. If the board makes such findings and reopens, the outstanding classification is rescinded and the registrant is reclassified; the registrant is then entitled to seek classification *de novo* by the Appeal Board. 32 C.F.R. 1625.11, 1625.13.

In this case, after petitioner notified the board that his father had died, the board conducted an investigation to determine whether it should reopen petitioner's classification despite the fact that he had already been ordered to report for induction. After thorough consideration of the matter, the board concluded that it should not reopen.

Petitioner contends that the board's investigation constituted a reopening of his classification, from which he should have been entitled to seek classification *de novo* from the Appeal Board (Pet. 5). (Petitioner does not claim that the local board's classification of him as I-A lacked a basis in fact.) But under 32 C.F.R. 1625.2, *supra*, the board cannot reopen unless it first makes specific findings that the registrant's status has changed. The board considered petitioner's family's financial condition in order to determine whether such findings were justified; it concluded they were not and petitioner does not challenge that conclusion. The mere fact that the board conducted a thorough investigation before deciding

whether to reopen does not show that petitioner's classification was in fact reopened and that petitioner was then classified anew; instead, the board's investigation shows only that it faithfully fulfilled its duty under 32 C.F.R. 1625.2 by carefully considering whether petitioner's status had changed as a result of his father's death. See *Paszel* v. *Laird*, 426 F. 2d 1169 (C.A. 2).[3]

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[3] *Miller* v. *United States*, 388 F. 2d 973 (C.A. 9), on which petitioner relies (Pet. 5-6), is not to the contrary. In *Miller* the court found that the board had no duty to make the specific findings required by 32 C.F.R. 1625.2 in order to allow reopening because the State Director had relieved the board of its duty to comply with this regulation. (388 F. 2d at 975.) That is not the situation in this case, where the State Director instructed the board that before it acted under 32 C.F.R. 1625.2 it should have a dependency questionnaire (Form 118) and a welfare report.

United States v. *Grier*, 415 F. 2d 1098 (C.A. 4), on which petitioner also relies, involved reopening *before* notice to report for induction. In that situation, the registrant must show only that he is *prima facie* entitled to a new classification on the basis of evidence he has submitted. The court found that the registrant had made such a showing and that the board therefore erred in not reopening. By contrast, this case involves a request for reopening *after* notice of induction; the board is required to make specific findings before it can grant such a request. Compare 32 C.F.R. 1625.4, with 32 C.F.R. 1625.2 Moreover, petitioner's argument is not that the board erred in not reopening; instead, his contention is that by investigating before deciding whether to reopen the board in fact did reopen and reclassify him.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1971.

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